Working as an employee of NOITU was Petitioner's only business activity during the years at issue. (R. at 38.) He did not work for any other person or organization, either as an employee or as an independent contractor. (R. at 38.)

Petitioner set up an office in his home in Nashville to perform duties for NOITU. (R. at 38.) NOITU arranged for a long-distance data line from its Jamaica, New York office to Petitioner's Nashville office. (R. at 38.) Petitioner had a dedicated voice telephone line that he used solely for business purposes and another telephone line for personal telephone calls. (R. at 38.) Petitioner's one-room office included telecommunications equipment, computers, a printer, a desk and desk chair, and work tables. (R. at 38.) Office expenses, including telephone and supplies, were reimbursed to Petitioner by NOITU on a monthly basis. (R. at 38.)

Most of Petitioner's computer programming work was done in Nashville. (R. at 38.) He traveled to New York for the purpose of instructing NOITU's New York personnel in the use of new or revised computer programs. (R. at 38.)

Petitioner's work for NOITU did not involve any administrative responsibilities for the New York office, nor did he supervise New York personnel or have any involvement in the running and the management of the New York office. (R. at 39.) His work involved preparing and revising computer programs that were used by NOITU and instructing NOITU's personnel in their use. (R. at 39.) In the course of his work, Petitioner was in daily contact with NOITU's New York office by telephone. (R. at 39.)

In a typical week, Petitioner spent approximately 45 hours working for NOITU. (R. at 39.) Most of his work was done at his office in Nashville. (R. at 39.) Nashville is 900 miles from New York City. (R. at 39.) Published airline

schedules indicate that a flight from Nashville to New York takes about two hours. (R. at 39.) During 1994, Petitioner worked 187 days in Tennessee and 59 days in New York. (R. at 39.) During 1995, Petitioner worked 180 days in Tennessee and 62 days in New York. (R. at 39.)

When Petitioner came to New York on NOITU business, he stayed in a hotel near NOITU's office. (R. at 39.) In 1994, Petitioner came to New York 8 times. (R. at 39.) His average stay was 8 work days and his longest stay was 10 work days. (R. at 39.) In 1995, Petitioner came to New York 8 times. (R. at 39.) His average stay was 8 work days and his longest stay was 19 work days. (R. at 39.)

Petitioner was not an officer or member of the Board of Directors of NOITU. (R. at 39.) He owned no stock or any other equity interest in NOITU nor did he lend any money to NOITU. (R. at 39.)

REASONS FOR GRANTING THE WRIT

I. NEW YORK'S TAXATION OF PETITIONER'S INCOME AND THAT OF OTHER SIMILARLY SITUATED TELECOMMUTERS VIOLATES DUE PROCESS BY TAXING INCOME THAT CLEARLY WAS NOT DERIVED FROM NEW YORK STATE; THIS TAXATION IS OUT OF ALL APPROPRIATE PROPORTION TO PETITIONER'S BUSINESS IN NEW YORK

While states have, and generally assert, the right to tax 100% of the income of a resident (typically providing a credit for taxes the resident must pay to other states), the Constitution and principles of fundamental fairness prevent a state from taxing more than its fair share of the income of any nonresident who is taxable in that state. *Shaffer v. Carter*, 252 U.S. 37, 57 (1920).

A. The Convenience of the Employer Scheme

The New York State Legislature acknowledged the limitations on the State's right to tax the income of nonresidents by statutorily authorizing the taxation of only that portion of a nonresident's income that is derived from New York sources. N.Y. Tax Law §§601(e), 631. New York source income is *statutorily* defined to include only that portion of the worker's compensation "attributable to . . . a business, trade, profession or occupation carried on in this state." N.Y. Tax Law §631(b). The operative standard set is not where the employer's business is located but where the nonresident who is subject to the personal income tax carries on his or her business or occupation. *Oxnard v. Murphy*, 19 A.D.2d 138; 241 N.Y.S.2d 333 (App. Div. 3d Dep't 1963) ("the work done, rather than the person paying for it, should be regarded as the 'source' of income"), *aff'd*, 15 N.Y.2d 593, 255 N.Y.S.2d 260, 203 N.E.2d 648 (1964).

The Division has adopted regulations that provide that if a nonresident employee "performs services for his employer both within and without New York State, his income derived from New York State sources includes that proportion of his total compensation for services rendered as an employee which the total number of working days employed within New York State bears to the total number of working days employed both within and without New York State." N.Y. Comp. Codes R. & Regs. tit. 20, § 132.18(a). Thus, if an employee works 200 days in a given year, 120 of them being in New York and 80 of them being outside New York, 120/200, or 60%, of his or her compensation income will be treated as New York source income that will be subject to tax.

However, the same regulation that provides for apportionment of income for nonresidents also imposes a prerequisite to apportionment. That prerequisite, known as

the Convenience of the Employer Test, provides that "any allowance claimed for days worked outside New York State must be based upon the performance of services which of necessity, rather than convenience, obligate the employee to out-of-state duties in the service of his employer." *Id.* The Division has interpreted this regulation to mean that "necessity" is not present even when an employer tells an employee that it will not provide office space in New York and that he must work from his home if the nature of his work was such that it could conceivably have been done in New York. *See In re Annitto* (Division Advisory Op.), TSB-A-96(10)I (Dec. 27, 1996).

The Division has invoked the Test against Petitioner to tax 100% of his income, on the grounds that it was merely "convenient" for him to perform 75% of his services at his principal place of business in Tennessee and that he was not absolutely precluded from coming to New York every day to perform those services. Under this approach, the regulation would permit New York State to tax 100% of a telecommuter's income even if he or she spent only one day in New York State. (Respondents admit that under the Due Process Clause they cannot tax a person who never sets foot in New York.)

B. The Due Process Clause Prohibits a State from Taxing the Income of a Nonresident Derived from Sources Outside its Borders

The issue in this appeal is whether New York State is taxing a constitutionally permissible portion of Petitioner's income. Petitioner is not arguing that he has no constitutional *nexus* with New York State, or that New York cannot tax any of his income. In fact, Petitioner willingly paid personal income tax on that portion of his income that reflected the proportion of his working days that were spent in New York.

This Court has, however, made it clear that there is a difference between the states' power to tax residents and their power to tax nonresidents. With respect to nonresidents, the states can tax only income attributable to activities carried on within the state. As this Court said in the leading case of *Shaffer v. Carter*:

> As to residents [a state] may, and does, exert its taxing power over their income from all sources, whether within or without the State . . . . As to nonresidents, the jurisdiction extends only to their property owned within the State and their business, trade, or profession carried on therein, *and the tax is only on such income as is derived from those sources.*

252 U.S. 37, 57 (1920) (emphasis added); *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920). New York State may not tax that portion of the income of a nonresident that is not derived from his or her carrying on of a business within the State.

This Court has determined that the Due Process Clause prohibits a state from taxing a nonresident taxpayer's income to an extent that is out of all proportion to the taxpayer's contacts with the state. *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123 (1931). In the same vein, the Due Process Clause requires that the income attributed to a state under that state's tax laws be rationally related to the values connected with the taxing state. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978); *Norfolk & Western R. Co. v. Missouri*, 390 U.S. 317 (1968). A taxing provision must be struck if it causes taxation "'out of all appropriate proportions to the business transacted ... in that State', or has 'led to a grossly distorted result.'" *Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358, 380 (1991) (citing *Moorman Mfg. Co.*, 437 U.S. at 274; *Norfolk & Western R.*

Co., 390 U.S. at 326; *Hans Rees' Sons, Inc.*, 283 U.S. at 135).

In *Hans Rees*, the State's attempt to tax 80% of the taxpayer's income instead of the 22% that was attributable to the taxpayer's activities in the State was declared unconstitutional. 283 U.S. at 132-36. The proportions are strikingly similar to those in this case. It is beyond dispute and conceded by Respondents that only roughly 25% of Petitioner's services for his employer were performed within New York State. Applying the Convenience of the Employer Test to tax the 75% of Petitioner's income that is indisputably derived from work that Petitioner performed *outside* of New York State, at his principal place of business in Tennessee, causes New York State to tax 300% more than the amount of income that the Constitution permits it to tax.

The majority opinion of the New York Court of Appeals denies that Due Process places any proportionality requirement on the State, contending that Petitioner had demanded that such a proportionality requirement be "engraft[ed] ... upon existing due process precedent." (Pet. App. 11.) To the contrary, this Court's decision in *Hans Rees* clearly precludes a state from attributing too great a percentage of income to the state, otherwise the taxes that result are "beyond the state's authority" in violation of *Shaffer*.

No complex mathematical or statistical formulae are needed to see that this is unquestionably out of all proportion to Petitioner's contacts with New York. He spent only 25% of his working days in New York, but New York taxes 100% of his income. This is a clear violation of the Due Process Clause of the United States Constitution. U.S. Const. amend. XIV, § 1.

C. The Benefits Provided to a New York Employer Do Not Justify Taxation of 100% of the Income of Its Nonresident Employees – They are Separate Taxpayers and Each Should Pay Only Its Fair Share for Benefits Received

The courts below justified New York's taxation of 100% of his income by finding that level of taxation to be rationally related to the benefits New York provides to his New York-based employer – not the benefits received by Petitioner, the taxpayer. (Pet. App. 12-13, 32-33.) But the only taxpayer here is Petitioner, not his employer. The personal income tax imposed is Petitioner's burden, not that of his employer. The burdens of and benefits afforded to Petitioner and his employer are not the same, and the constant presence of one in New York State cannot justify unlimited taxation of the other.

Indeed, New York separately taxes employers located within its borders – directly taxing the income of such corporations and other business entities.[2] While his employer was present in New York State every day of the year, Petitioner was not. Petitioner spent 25% of his working days in New York and he willingly paid New York personal income tax on 25% of his income. On the other 75% of his working days, Petitioner physically worked in Tennessee. To the extent that he required fire, police, postal, utility or other governmental services on those days, he called upon the resources of Tennessee – not New York.

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[2] It is ironic that New York allows employers to apportion their income based on the relative amounts of their property, payroll, and sales located in the state, yet it uses the employer's presence in the state to deny the right to apportion income to its employees.

This Court has held that the decisive issue in the Due Process analysis of whether a state has overreached its taxing jurisdiction is the true "operating incidence of [the] challenged tax" and whether "by the practical operation of a tax the state has exerted its power *in relation to* opportunities which it has given, to protection which it has afforded, to benefits which it has conferred...." (emphasis added). *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940).

In contrast to decisions such as *International Harvester Co. v. Wisconsin Dep't of Taxation*, 322 U.S. 435 (1944), this is not a case in which a passive investor is being taxed on the income earned by an entity in which he or she has invested, based on the fact that the entity earned its income in that state. Instead, Petitioner has had to actively work for every dollar that he earned, and he performed 75% of the services that generated this income in Tennessee. *See Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 80 (1938) (the Due Process limits that prevent a state from taxing value earned outside its borders "are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state."). Even the *International Harvester* Court acknowledged that Wisconsin could only tax "the earnings that actually arise there." 311 U.S. at 444. Only 25% of Petitioner's earnings arose in New York State and New York may tax no more than that.

The dissenting opinion (which was joined by two other justices) of the New York Court of Appeals below pointed out that the majority's theory that "the entity that pays Huckaby's salary, his employer, is a 'value' on which jurisdiction to tax may be based" is "unsupported by any precedent, is a radical departure from long-accepted limits on the powers of states to tax nonresidents." (Pet. App. 25 (dissent).) (further noting awareness of "no case in which it has been held, or even argued, that an in-state source of

payment for services done outside the state is a constitutionally valid basis for taxing the recipient of the payment.") The dissent further explained the illogic of this justification for the Convenience of the Employer Test: "[i]f the location of a taxpayer's employer is taxable 'value', there is no reason in principle why New York may not tax all out-of-state employees of New York firms ... [a]nd other states can return the compliment, applying their own income taxes to New York residents who work for firms headquartered in California or Massachusetts." (Pet. App. 26 (dissent).)

Professor Walter Hellerstein, a preeminent constitutional law scholar in the area of state and local taxation, has presented a similar analysis:

> The "convenience of the employer" doctrine does not reflect the factors that underlie a state's constitutional power to tax nonresidents' income – namely, whether the state is providing benefits or protections with respect to the production of that income. A taxpayer's reasons for working at home instead of at his or her office have little bearing on the benefits or protections that a state is providing with respect to the production of that income.
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> New York's claim that it is the source of all of a nonresident employee's income derived from personal services performed outside the state is difficult to reconcile with the fundamental due process principle that a state's power to tax a nonresident's income extends only to income derived from services "carried on therein."

Jerome R. Hellerstein & Walter Hellerstein, State Taxation ¶ 20.05[4][e] (3d ed. 2003). Professor Hellerstein reaffirmed

his conclusion, noting that "New York's claim that it is the source of all of a nonresident employee's income derived from personal services performed outside the state for the employee's convenience is difficult to reconcile with the fundamental due process principle that a state's power to tax a nonresident's income extends only to income derived from services 'carried on therein.'" Walter Hellerstein, *Reconsidering the Constitutionality of the "Convenience of the Employer" Doctrine*, 28 State Tax Notes 535 (May 2, 2003) (defensibility of the Convenience of the Employer Test is at its weakest in the context of telecommuters).

The taxing power here attempted to be exerted by New York State clearly does not bear the requisite "fiscal relation to protection, opportunities and benefits given by the state" to the telecommuting employees who actually bear the incidence of the tax. *J.C. Penney*, 311 U.S. at 444. Due Process forbids this result.

II. THE COURT OF APPEALS ERRONEOUSLY FOUND FAIR APPORTIONMENT UNDER THE COMMERCE CLAUSE

The Court of Appeals' majority opinion wrongly concludes that the Convenience of the Employer Test's taxation of 100% of Petitioner's income does not violate the Commerce Clause fair apportionment requirement for state taxes. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). The conclusion that the majority reached is that "only income sourced to New York" is taxed because New York State will not tax the *employee's* income if and when the State is satisfied that the *employer* chose to participate in interstate commerce by requiring its worker to perform his or her services at a location outside New York. (Pet. App. 13.)

Simply put, the employer does choose to participate in interstate commerce when it agrees to employ an out-of-state telecommuter. Indeed, the Tennessee Department of Revenue will tax an out-of-state company based on the presence of a single telecommuter in the state. Tennessee Department of Revenue Ruling 00-38 (2000). Furthermore, the majority provides no authority for its assertion that it can properly characterize all wages as New York source income so long as the employer did not specifically need the services to be performed outside New York. This approach assumes away the entire issue of fair apportionment.

The Commerce Clause does not permit such a result. This Court has held that, under the external consistency test for fair apportionment, a state tax must tax "only that portion of the revenues from the interstate activity which reasonably reflects the *in-state component of the activity being taxed*." *Goldberg v. Sweet*, 488 U.S. 252, 262 (1989) (citing *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 169-70 (1983)) (emphasis added). *See also Oklahoma Tax Comm'n v. Jefferson Lines*, 514 U.S. 175, 185 (1995) (the external consistency requirement mandates that a tax not "reach[] beyond that portion of value that is fairly attributable to economic activity within the taxing State").

Here, the activity being taxed is the individual performance of services to earn wages, not the economic activity of the employer entity. From New York's perspective, the in-state component of Petitioner's activity – the activity being taxed – is only 25% of the total. The taxation of anything more than that, much less the taxation of 100% as New York attempts here, fails the Commerce Clause requirement that a state tax be fairly apportioned.

III. THE CONVENIENCE OF THE EMPLOYER REGULATION VIOLATES THE EQUAL PROTECTION CLAUSE BY APPLYING AN ARBITRARY AND IRRATIONAL STANDARD TO DETERMINE WHICH NONRESIDENTS ARE PROHIBITED FROM ALLOCATING ANY INCOME OUTSIDE THE STATE

Even if a line must be drawn encircling those nonresident workers who should not be allowed to allocate any income outside of New York to prevent abuse of the right to apportion,[3] the Convenience of the Employer Test draws that line in such an irrational fashion as to violate the Constitution's Equal Protection Clause. As it applies to Petitioner – whose principal place of business was not in New York – the Test violates the Equal Protection Clause.

By approving New York's application of the Test to Petitioner, the courts below permitted the State to utterly disregard the actual proportion of Petitioner's working days in Tennessee, simply because his income was paid by a New York employer. The fact that the wages were paid by an employer located in New York is pretextual justification for New York to tax 100% of the wages, simply because an office *could* have been made available in New York and the employee *could* have moved 900 miles across the country to work there 100% of the time. There is no rational basis for this standard as it has been applied to Petitioner.

Both the New York State statute and the United States Constitution prohibit the State from taxing income of

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[3] The Convenience of the Employer Test does, properly, prevent someone whose principal place of business is in New York but who claims that weekend days are spent working at his or her non-New York home from improperly attempting to manipulate the working day apportionment standard to reduce New York State tax liability.

a nonresident that is not attributable to activities carried on within the State. Even at the lowest levels of Equal Protection scrutiny, to have constitutional validity a statutory distinction must be rationally related to a legitimate state objective. *Harrah Indep. Sch. Dist. v. Martin*, 440 U.S. 194, 198 (1979). While that legitimate state objective may exist in certain circumstances, the Test is overbroad and applied to reach unconstitutional results.

The Convenience of the Employer Test applies solely to nonresidents of New York State – a class deserving an even higher level of scrutiny. *Fitzgerald v. Racing Ass'n of Central Iowa*, 539 U.S. 103 (2003) (confirming that a higher standard of review applies in cases involving discrimination against out-of-state actors). The State's objective here is to tax the income that it constitutionally may tax: the income of a nonresident derived from activities within the State.

As Professor Hellerstein observed in the passage quoted above (*supra*, at 15), there is no conceivable connection between the voluntariness of the taxpayer in performing services outside the State and the benefits derived by him from the State or the extent to which his income can justly be attributed to activities carried on within the State. If compensation for services performed outside the State is constitutionally protected from tax in the case of a nonresident, the State cannot choose to exempt only that income derived from services that are required to be performed outside the State by employer necessity and tax income from services that are performed outside the State for the employee's convenience. Such a distinction bears no rational relationship to a legitimate State objective and violates the Equal Protection Clause of the United States Constitution. U.S. Cont. amend. XIV, §1. The location where the services are performed is the only constitutionally valid fact; the reasons why the services were performed where they were is irrelevant.

Using the most circular of reasoning, the Court of Appeals majority opinion assumes away the constitutional violation present in its validation of the taxation of income out of all proportion to the services performed in New York, concluding that the employee convenience distinction is not an arbitrary classification because it survived the majority's flawed Due Process analysis and "properly taxes nonresidents only on income sourced to New York." (Pet. App. 14.) While this justification might conceivably be appropriate in the case of a local nonresident commuter who takes work home on the weekend, it does not extend to a long-distance telecommuter such as Petitioner whose principal place of business was in Tennessee and who never had a principal place of business in New York.

Early decisions from New York courts highlight that the Test "merely serves to protect the integrity of the apportionment scheme by including income as taxable income where it results from services substantially connected with New York but performed outside New York *to effect a subterfuge*." *Colleary v. Tully*, 69 A.D.2d 922 (NY Ct. App., 3d Dep't 1979) (emphasis added).

For a local commuter the Convenience of the Employer Test defeats any attempt to apportion wages outside New York by simply spending a few hours on the weekend working from a home in Connecticut or New Jersey. However, there is no attempt to "effect a subterfuge" in Petitioner's case. Petitioner is not trying to distort the days-worked formula by part-time work done on his living room couch. His principal place of business where he spent the vast majority of his working hours was in Nashville, Tennessee, far from New York. The rationale for applying the Convenience of the Employer Test to some taxpayers clearly does not apply to him. *Cf. Zelinsky v. Tax Appeals Tribunal*, 1 N.Y.3d 85; 801 N.E.2d 840; 769 N.Y.S.2d 464 (2003), *cert. den.*, _ U.S. _, 158 L. Ed. 2d 619 (2004)

(Convenience of Employer Test properly applied to Connecticut commuter whose out-of-state work was ancillary to that performed at his principal place of business in New York). The fact that the performance of Petitioner's services took place as the result of Petitioner's choice to work in Tennessee – a choice fully accepted and agreed to by his New York employer – simply is not a constitutionally sound basis for using the Convenience of the Employer Test to impose New York personal income tax on 100% of his wages.

CONCLUSION

This case brings to the fore the plight of every telecommuter who works in one state for an employer located in another. Petitioner, as one of the millions of Americans who telecommute, has been excessively taxed by a state that is unwilling to concede that it cannot constitutionally tax income earned outside its borders. While telecommuting is a relatively new but rapidly growing segment of our nation's economy, the constitutional principles that Petitioner's case brings to bear are not and they must be applied to prevent New York's unconstitutional taxation of nonresident telecommuters.

Petitioner respectfully requests that this Court grant this Petition for Certiorari, in order to review the decision of the New York Court of Appeals and to reverse the decision of that court and grant Petitioner Thomas L. Huckaby a refund of the taxes he has paid in this matter with interest, and all other and further relief as this Court deems appropriate.

RESPECTFULLY SUBMITTED

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